

**CITATION:** *Ryan v Queensland Building and Construction Commission* [2015] QCATA 2

**PARTIES:** Mr Shawn Ryan t/as Ausfire Doors and Penetrations (Appellant)  
v  
Queensland Building and Construction Commission (Respondent)

**APPLICATION NUMBER:** APL227-14

**MATTER TYPE:** Appeals

**HEARING DATE:** 10 December 2014

**HEARD AT:** Brisbane

**DECISION OF:** **Senior Member Stilgoe OAM, presiding  
Member Browne**

**DELIVERED ON:** 8 January 2015

**DELIVERED AT:** Brisbane

**ORDERS MADE:** **1. The application for leave to appeal or appeal is dismissed.**

**CATCHWORDS:** APPEAL – LEAVE TO APPEAL – OCCUPATIONAL REGULATION – PERMITTED INDIVIDUAL – where Tribunal found individual failed to follow advice – whether Tribunal considered all of the circumstances – whether discretion under s 56AD(8A) and (8B) properly exercised – where Tribunal confirmed the decision to refuse to categorise the individual as a permitted individual – where reasons given for the Tribunal’s decision - whether grounds for leave to appeal or appeal

*Queensland Building and Construction Commission Act 1991 (Qld), s 56AD, s 86  
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 24, s 146, s 147*

*Ausfire Doors and Penetrations v Queensland*

*Building and Construction Commission* [2014] QCAT 164  
*Soulemezis v Dudley (Holdings) Pty Ltd* [1987] 10 NSWLR 247, cited  
*Younan v Queensland Building Services Authority* [2010] QDC 158, cited

## REPRESENTATIVES:

**APPLICANT:** Shawn Ryan represented by Mr M Treston, Solicitor, Murray & Lyons Solicitors

**RESPONDENT:** Queensland Building and Construction Commission represented by Mr R Anderson of counsel instructed by Robinson Locke Litigation Lawyers

## REASONS FOR DECISION

### Senior Member Stilgoe OAM, Presiding

[1] In this matter, the Appeal Tribunal consisted of Member Browne and me. I have had the benefit of reading Member Browne's reasons in draft. I agree with her reasons, and her conclusions, and the order she proposes.

### Member Browne

- [2] Mr Ryan was a director of two companies, Ausco Firestop (NQ) Pty Ltd and Ryan Group Holdings Pty Ltd (RGH). Ausco was the trading entity for Mr Ryan and his ex-wife's fire door business operating in North Queensland since about 1996. RGH held capital assets.
- [3] Mr Ryan and his wife worked together in the business until 2008 when their marriage ended. Prior to the marriage ending there was a downturn in the construction industry and Ausco lost some of its clients. Ausco was in trouble because there was reduced cash flow.
- [4] Receivers and managers were appointed on 9 February 2010 to both companies. This was a "relevant company event" for the purposes of the *Queensland Building and Construction Commission Act 1991* (Qld) ("QBCC Act").<sup>1</sup> Mr Ryan was then categorised as an "excluded individual"<sup>2</sup> because he was the director of the companies and this meant he could no longer hold a licence unless he became a "permitted individual".<sup>3</sup>

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<sup>1</sup> QBCC Act s 56AC(2)

<sup>2</sup> Ibid s 56AC(4).

<sup>3</sup> Ibid s 56AD.

- [5] Mr Ryan applied in June 2010 and again later on 12 February 2013 to be categorised as a permitted individual under the QBCC Act. The QBCC refused both applications.
- [6] Mr Ryan then made an application for a review of the decision made by the QBCC on 25 February 2013 to refuse to categorise Mr Ryan as a permitted individual having been made an excluded individual as a director of Ausco.<sup>4</sup> Mr Ryan had an opportunity to present evidence at the hearing in support of his application. Mr Ryan gave evidence personally and by his accountant Mr Schreiber. Mr Schreiber's evidence was relevant because he had given accounting advice to Mr Ryan as a director of the companies.
- [7] The Tribunal made an order on 23 April 2014 that "the decisions" of the QBCC "to refuse to categorise [Mr Ryan] as a permitted individual are confirmed".<sup>5</sup>
- [8] Mr Ryan has filed an application for leave to appeal or appeal the Tribunal's decision. There are seven grounds of appeal. Some of the grounds raise similar issues that can be categorised as two broad grounds: the adequacy of the Tribunal's reasons and the application of the QBCC Act.
- [9] In the first ground Mr Ryan says that the learned Member's reasons are insufficient because he failed to identify the relevant accounting advice that was given by Mr Schreiber. Mr Ryan also says that the learned Member failed to explain how the accounting advice, if followed, would have avoided the coming into existence of the relevant events. Mr Ryan says that the learned Member acted without evidence and/or against the weight of the evidence by finding that a failure (by Mr Ryan) to follow the accounting advice was unreasonable.
- [10] There are a number of grounds of appeal that relate generally to the application or interpretation of s 56AD(8A) and (8B) of the QBCC Act. Mr Ryan submits the learned Member failed to use the purposive approach to the construction of the QBCC Act. He submits the learned Member erred in law when applying the legislation in determining whether Mr Ryan took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a relevant event. Mr Ryan also says the learned Member abrogated his decision making power by artificially distilling his considerations to the "principal circumstances" when a proper consideration of all of the circumstances was required under s 56AD.<sup>6</sup> Finally, Mr Ryan submits that the decision was

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<sup>4</sup> The application filed 22 March 2013 seeks a review of the QBCC's decision made on 25 February 2013 to refuse to categorise Mr Ryan as a permitted individual having been made an excluded individual as a director of Ausco for which receiver managers were appointed on 9 February 2010.

<sup>5</sup> *Ausfire Doors and Penetrations v Queensland Building and Construction Commission* [2014] QCAT 164.

<sup>6</sup> Grounds for leave to appeal and grounds of appeal dated 19 May 2014.

unreasonable or plainly unjust, and a substantial wrong has in fact occurred.

- [11] There is a separate ground that relates to the order made by the learned Member. Mr Ryan says the learned Member ought to have determined that Mr Ryan was an excluded individual for the first company event as it relates to Ausco and not also for “the other event”.
- [12] Some of the grounds raise errors of law and some are mixed fact and law for which leave is required.

### **Adequacy of reasons**

- [13] The reasons are several pages long and contain many references to the transcript of the evidence given at the hearing. I am satisfied that the reasons set out the “*essential ground or grounds upon which the decision rests*”.<sup>7</sup> The learned Member found that receivers were appointed “*as a result of loan repayment default*”.<sup>8</sup> He identified the circumstances that caused the happening of “the relevant events” and other relevant issues including “financial factors”, “marital relationship” and “cars”. He also identified the nature of the accounting advice given by Mr Schreiber.
- [14] Mr Schreiber advised Mr Ryan as director of the companies about reducing company debt and selling assets.<sup>9</sup> The transcript shows that Mr Schreiber gave advice about the sale of assets and that this was part of a “discussion” he had with Mr Ryan and his ex-wife “every year” from when he started working for them:

...at just about each meeting we would discuss what assets we should be looking at selling, what was going to be available, what approaches we should take as to which assets were more beneficial to sell, what would realise what values. That was always a discussion every year from when we originally started even doing their work prior to these periods.<sup>10</sup>

- [15] The transcript shows that Mr Schreiber had discussions with Mr Ryan in 2007 and 2008 about reducing debt and selling assets:

We would discuss that more in '07 and '08, when things started turning down, and that was one of the reasons why we wanted [the] cash – the recommendations were to sell some of the properties to reduce the debts and bring them back to a more manageable level. The nature of the business that Shawn was in was very much in the market. It was specialist, so it was a requirement in the building and construction industry. So by reducing some of those debts and selling them down, I believe that they could've traded back through at a far reduced rate but they had to reduce some of the debts to make it manageable or generate more work.<sup>11</sup>

<sup>7</sup> *Soulezis v Dudley (Holdings) Pty Ltd* [1987] 10 NSWLR 247 at 280.

<sup>8</sup> Reasons for decision, [27].

<sup>9</sup> *Ibid*, [26].

<sup>10</sup> T1-61 LL1-2.

<sup>11</sup> T1-63 LL1-8.

- [16] Mr Schreiber’s advice to reduce debt included recommendations to sell some of the properties (including motor vehicles<sup>12</sup>). Mr Schreiber gave evidence that Mr Ryan did not follow his advice:<sup>13</sup>

...They had built up a big portfolio of properties which were worth a lot of money. [Mr Ryan’s ex-wife] was looking to crystallise some of those so that she could spend more time with the children and that sort of thing. This is one of the pushes that we tried to have with [Mr Ryan] to offload some of the properties...<sup>14</sup>

- [17] The learned Member found Mr Schreiber to be “*clear*” in giving his evidence and as a witness to be “*honest and open*”.<sup>15</sup> The learned Member identified the relevant evidence of Mr Schreiber about the advice given from as early as 2007 that (if followed) would have enabled Mr Ryan to continue trading at a “reduced rate”. The learned Member said:

[Mr Schreiber] said, if they had reduced their debts and sold assets they could have traded on though at a reduced rate, but they had to reduce debt to make it manageable or generate more work...That was the advice he gave them. However, he also agreed that that advice was not followed.<sup>16</sup>

- [18] The learned Member made findings about Mr Ryan’s evidence; in particular the steps taken by him to purchase assets notwithstanding the advice to reduce debt and sell assets. The transcript shows Mr Ryan gave evidence about his “plan” to establish a car museum and that he sold no vehicles “*prior to [the] appointment of receivers*”.<sup>17</sup> It was therefore open to the learned Member to find that, despite the advice given by Mr Schreiber to sell assets that included motor vehicles, Mr Ryan continued to purchase motor vehicles in 2008.<sup>18</sup> The learned Member said:

But Mr Schreiber said he was not surprised that rather than sell motor vehicles Mr Ryan bought more...From 2007 Mr Schrieber had advised the directors they had to sell property to reduce debt. However that advice was not followed...It would therefore appear Mrs Ryan was prepared to follow the accountants’ advice, but not so Mr Ryan.<sup>19</sup>

...

A small farm, the Ryan’s biggest asset, was listed for sale and three properties were actually sold...None of the cars were sold and there is no evidence Mr Ryan tried to sell them. There is no evidence that any attempt was made to sell any other properties or that those other properties were not readily saleable.<sup>20</sup>

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<sup>12</sup> T1-62 LL25-29.

<sup>13</sup> T1-63 L11.

<sup>14</sup> T1-62 LL 6-11.

<sup>15</sup> Reasons for decision, [20].

<sup>16</sup> Ibid, [26], see T1-63 LL10-13.

<sup>17</sup> T1-36 LL44-47, T1-37 LL 1-3.

<sup>18</sup> T1-62 LL 22-24, LL31-32.

<sup>19</sup> Reasons for decision, [55].

<sup>20</sup> Ibid, [62].

- [19] There is no deficiency or error in the learned Member's reasons; in particular, there is no failure to identify the accounting advice given to Mr Ryan. It was open to the learned Member to make the finding that the "advice" (to sell assets) was given over a "*significant period of time*"<sup>21</sup> and that Mr Ryan "*failed to persuade*" him that the advice was "*appropriately followed*".<sup>22</sup> The learned Member identified the nature of the advice given that included the sale of assets to reduce company debt. His reasons identify the evidence given about the advice to reduce debt and generate cash flow. The learned Member identified Mr Schreiber's evidence relevant to the findings made about Mr Ryan's attempts to sell assets. The reasons adequately demonstrate why the learned Member was not persuaded that Mr Ryan took "*all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event*".<sup>23</sup>

### Application of s 56AD

- [20] The learned Member identified the circumstances that resulted in the happening of the relevant event for both companies as the failure to "*reduce excessive debt*" and the breakdown in Mr Ryan's marriage.<sup>24</sup> He correctly identified the issues in applying s 56AD, in particular whether Mr Ryan took "*all reasonable steps to avoid the coming into existence of those circumstances*"<sup>25</sup> and whether Mr Ryan "*acted reasonably*".<sup>26</sup>

It is not in issue that Mr Ryan sought appropriate advice. What is in issue is whether or not he acted reasonably in respect of the advice given.<sup>27</sup>

- [21] The learned Member referred to the decision of *Younan v Queensland Building Services Authority*<sup>28</sup> which states "[if]...[Mr Ryan] fails to show...that he took all reasonable steps...then the application will fail".<sup>29</sup>
- [22] *Younan* is also relevant in determining whether all "reasonable steps" were taken. *Younan* requires a consideration of what action was taken (by Mr Ryan) at the relevant time and what was reasonable in all of the circumstances without the benefit of hindsight. McGill DCJ said:

The section speaks about taking reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event. The test in s 56AD(8) requires first, the identification of the relevant event; second, the identification of the circumstances that resulted in the happening of the relevant event; third, a consideration of whether the relevant individual took all reasonable steps to avoid those circumstances coming into existence; and, if satisfied of that, fourth, a decision whether to

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21 Ibid, [63].  
 22 Ibid, [65].  
 23 Ibid, [65].  
 24 Ibid, [2], [39] and [43].

25 Ibid, [43] and [44].

26 Ibid, [48].

27 Ibid, [48].

28 [2010] QDC 158.

29 *Younan v Queensland Building Services Authority* [2010] QDC 158.

categorise the individual as a permitted individual. What were reasonable steps depended on what was reasonable for the individual concerned in the circumstances in which he found himself, with such information as he then had ... It is not a question of whether he did everything possible to prevent these circumstances from arising, or whether they would not have arisen if he had acted differently. The reasonableness of his behaviour must be assessed by reference to what was known by him at the time, without the benefit of hindsight....<sup>30</sup>

- [23] The learned Member has identified all of the circumstances relevant to the “event” including the impact of the marriage separation and Mr Ryan’s health resulting from marital conflict. He found that there was conflict between Mr Ryan and his ex-wife about the direction of the business from 2006 before separation:

[Mr Schreiber] elaborated that both the relationship between husband and wife and the direction they wanted to take the business as directors had been changing for a number of years before the separation, but neither party would directly address the linked issues. From 2006, 2007 he observed Mrs Ryan was keen to sell assets and reduce debt and simplify the business. On the other hand Mr Ryan wanted to see the business grow and the assets increase. There was a significant degree of conflict between them over these issues taking place well before 2008. Obtaining clear decisions and direction from them was difficult because they were so often in conflict...<sup>31</sup>

- [24] The learned Member also considered Dr Brodie’s evidence about Mr Ryan’s health and his capacity to make a decision in the circumstances. The learned Member found that Mr Ryan experienced “*anxiety and stress*” attributable to his relationship breakdown but his health did not render him “*incapable of sensible decision making*”.<sup>32</sup>

There is evidence from Mr Ryan’s medical practitioner that over the period 2008 through 2010 Mr Ryan experienced anxiety and stress which the medical practitioner attributes to his relationship breakdown. Mr Ryan says he was under an intolerable emotional strain and his separation left him physically and mentally drained and in a debilitated emotional state which considerably burdened his business activities.<sup>33</sup>

- [25] In finding that Mr Ryan had failed to show that he took “*all reasonable steps*”, the learned Member found that there was no evidence of “*attempts*” made by him to sell “*any other properties*” or that the properties were not “*readily saleable*”.<sup>34</sup> This was a relevant finding in considering whether Mr Ryan took “*all reasonable steps*” because, consistent with the evidence before the Tribunal and the findings made, Mr Ryan had received advice from Mr Schreiber to reduce debt and sell assets. The learned Member stated:

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<sup>30</sup> *Younan v Queensland Building Services Authority* [2010] QDC 158, [26].

<sup>31</sup> Reasons for decision, [32].

<sup>32</sup> *Ibid*, [50].

<sup>33</sup> *Ibid*, [33].

<sup>34</sup> *Ibid*, [62].

A small farm, the Ryans' biggest asset, was listed for sale and three properties were actually sold...None of the cars were sold and there is no evidence Mr Ryan tried to sell them. There is no evidence that any attempt was made to sell any other properties or that those other properties were not readily saleable.<sup>35</sup>

- [26] The learned Member considered Mr Ryan's contentions that his ex-wife had attempted to "thwart" his attempts to sell property. Mr Ryan as the applicant had the opportunity to present evidence at the hearing to support his contentions. In his reasons, the learned Member made earlier findings about attempts made by Mr Ryan's ex-wife and Mr Schreiber to sell assets prior to separation (2008) and found that Mr Ryan was "*reluctant to follow that course*".<sup>36</sup> It was therefore open to the learned Member to find that there was no evidence that Mr Ryan's ex-wife "*opposed the sale of property, real or personal*".<sup>37</sup>

Mr Ryan maintained his wife tried to thwart his attempts to sell property at every turn in a vindictive and uncooperative display of behaviour...I accept she took the business computer, and that caused problems, but there is no evidence that she opposed the sale of property, real or personal. Quite the contrary on the evidence given by Mr Schreiber.<sup>38</sup>

- [27] As I have noted, *Younan* also requires a consideration of what was "reasonable" for Mr Ryan "*in the circumstances in which he found himself*". The learned Member considered whether it was reasonable for Mr Ryan to "adopt" the advice given by Mr Schreiber in the circumstances in which he found himself such as the breakdown of his marriage.<sup>39</sup> The learned Member found, having accepted the evidence of Mr Schreiber, that a "high level conflict" existed before the marriage separation in 2008:

Concerning the breakdown in the marriage, Mr Schreiber's evidence is that well before separation, husband and wife had matrimonial problems. There was a high level of conflict between husband and wife occurring well before [2008]...whilst the separation may have been sudden and shocking to [Mr Ryan], I do not find it rendered him incapable of sensible decision making. There was corroborative evidence from Dr Brodie in that regard.<sup>40</sup>

- [28] There is no error in the Tribunal's application or interpretation of s 56AD. The learned Member has correctly applied the test in s 56AD(8) by identifying the relevant circumstances that resulted in the happening of the event and has considered whether Mr Ryan "took all reasonable steps". It was open to the learned Member, based on the evidence before him including the evidence of Mr Ryan and Mr Schreiber, to make the finding that he was not satisfied that Mr Ryan took all reasonable steps in the circumstances.

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35 Ibid, [62].

36 Ibid, [53].

37 Ibid.

38 Ibid, [60].

39 Ibid, [48] and [49].

40 Ibid, [50].





### Order made to confirm the decisions

- [29] Mr Ryan is an excluded individual for two company events. This means Mr Ryan can be made a “*permanently excluded individual*” under the QBCC Act in circumstances where he has “*twice been an excluded individual for a relevant event*”.<sup>41</sup> Mr Ryan could have applied to review the earlier decisions made by the QBCC to categorise him as an excluded individual.<sup>42</sup> Mr Ryan instead made application to be categorised as a permitted individual. The learned Member confirmed “the decisions” made by the QBCC when in fact Mr Ryan only reviewed the QBCC’s decision as it relates to Ausco.
- [30] Mr Ryan now seeks an order that he be categorised as an excluded individual for only the first company event. The decision to categorise Mr Ryan as an excluded individual was never before the learned Member because Mr Ryan only reviewed the decision to be categorised as a permitted individual. That is the path Mr Ryan chose and the order made by learned Member relates only to the decision sought to be reviewed. That is all the learned Member could do and there is no error in the order made to confirm the decisions to refuse to categorise Mr Ryan as a permitted individual.
- [31] Mr Ryan has not been successful on appeal in identifying any error in the Tribunal’s reasons. The power to grant relief under s 146 and s 147 of the QCAT Act is not enlivened. There is no order the Appeal Tribunal can make to grant Mr Ryan the relief he is seeking. To the extent that he needs leave, it is refused. On grounds for which leave is not required, the appeal is dismissed.

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<sup>41</sup> QBCC Act s 58.

<sup>42</sup> QBCC Act s 86.